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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

STATE OF MISSOURI, at the Relation of MISSOURI INSURANCE COMPANY, a Corporation, Relator,
Appellant (Petitioner),

vs.

FREDERICK GEHNER, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis; A. R. SCHOLLMEYER, CLYDE CARSON, WILLIAM L. HECKMANN and JOSEPH J. LICHTENFELD, as Members of the Board of Equalization of the City of St. Louis,
Appellees (Respondents).

No. 222.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLANT (PETITIONER).

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STATEMENT, BRIEF AND ARGUMENT FOR APPELLANT (PETITIONER).

STATEMENT.

Preliminary. The relator, Missouri Insurance Company, a corporation, is a domestic insurance company having its principal office in the City of St. Louis, Missouri, and at all times engaged in the life insurance business in the State of Missouri. The appellee, Frederick Gehner, is, and was at all times mentioned in this litigation, the duly elected and qualified Assessor of the City of St. Louis and President of the Board of Equalization of said City.

The other named appellees are members of said Board of Equalization.

After an assessment by said Assessor and Board of Equalization for personal taxes as of June 1, 1925, the said relator, Missouri Insurance Company, instituted this action, which is an original proceeding by certiorari begun in the Supreme Court of Missouri for the purpose of quashing the record of said Assessor and Board of Equalization (Rec., pp. 1-5). A writ of certiorari was issued by the Supreme Court of Missouri in said action on September 29, 1926 (Rec., pp. 5-6), and the cause was heard in the Supreme Court of Missouri on a stipulated record (Rec., p. 7).

The Supreme Court of Missouri, by an opinion filed February 11, 1929, quashed its writ of certiorari (Rec., pp. 14, 18), whereupon in due time the relator filed its motion for rehearing. Upon consideration of said motion for rehearing the Supreme Court of Missouri modified its opinion and refiled the same and overruled said motion on March 27, 1929 (Rec., pp. 16-19), and entered judgment accordingly.

The questions before the Supreme Court of Missouri and in this court involve the construction of Section 6386, Revised Statutes of Missouri 1919. Said section 6386, so far as relates to this appeal, is printed as appendix A to this brief.

In due time, to wit, on June 24, 1929, the relator's petition for appeal was filed and allowed by order of the Chief Justice of the Supreme Court of the State of Missouri

(Rec., pp. 28-29). Subsequently, after the papers on appeal were duly filed in this Court, the relator also filed its petition for certiorari on the record filed in conjunction with the appeal.

The Facts. The stipulated record below shows that, subsequent to June 1, 1925, and as of said date, as required by law, the relator duly made its tax return to said Assessor of the City of St. Louis, of all its property for taxation. In said return and as a basis for arriving at the taxable value of its property, the relator set down its property as follows, to wit (Rec., pp. 7-8):

Real Estate		$142,000.00
Bonds, Municipal		289,000.00
Bonds, Government		94,000.00
Bonds, Mortgages		60,000.00
Cash		5,265.33
Total Assets		$590,265.33
Reserve		$326,522.69
Total assets		$590,265.33
Less real estate on which the Company pays taxes	$142,000.00	
Less reserve required by law.	326,522.69	
Less United States Government Bonds	94,000.00	
Less unpaid policy claims, sick	5,143.00	
Less unpaid policy claims, death	1,821.00	$569,486.69
		$ 20,778.64

(Note: There is a clerical error in subtraction in the stipulated record, wherein the net taxable assets of relator's return are shown as $30,778.64, whereas the amount should be $20,778.64, as found by the Supreme Court in its opinion, as shown on page 16 of the record.)

On the face of said return the net amount of relator's personal property subject to taxation on June 1, 1925, was $20,778.64. This amount was arrived at in said return by deducting from relator's total assets real estate otherwise taxed, not here involved, in the sum of $142,000.00, and United States Government bonds in the sum of $94,000.00, leaving taxable personal assets of $354,265.33. The relator then deducted from said taxable assets its legal reserve including unpaid policy claims, shown by its said return and conceded to be correct, in the sum of $333,486.69, leaving net taxable assets in said sum of $20,778.64.

Notwithstanding the aforesaid return and facts therein stated, said Board of Equalization, on March 31, 1926, duly notified the relator of its intention to assess the relator on said return for cash in bank, $5,260.00, and solvent bonds, $349,000.00, and required the relator to appear before said board at a time stated and show cause why such assessment should not be made. Thereafter, in conformity to said notice, the relator appeared before the said board and a hearing was had under said notice (Rec., pp. 8-9). Upon said hearing said Board of Equalization made its findings in accordance with the facts stated in said re-

turn, but also determined that, notwithstanding the legally required reserve and unpaid policy claims amounted to $333,486.69, the relator was not entitled to deduct said reserve from its total assets amounting to $354,265.33, because in the opinion of said board, based upon the advice of the City Counselor of the City of St. Louis, Section 6386 of the Revised Statutes of Missouri, 1919, under which the relator sought to deduct said legal reserve, was unconstitutional and in contravention of Article I, Sections 3, 4 and 7 of the Constitution of the State of Missouri requiring uniformity of taxation, and said board thereupon arbitrarily fixed the amount of relator's net taxable personal property at the sum of $50,000.00. Said board did not refuse to deduct the amount of relator's Government bonds, but based its finding solely upon the alleged invalidity of said Section 6386 (Rec., pp. 10-12).

Thereafter, the appellant, State of Missouri, at the relation of Missouri Insurance Company, instituted this original action by certiorari in the Supreme Court of the State of Missouri, and obtained a writ of certiorari against the appellees herein (Rec., pp. 2-6). In due time said cause came on for hearing before the Supreme Court of Missouri, en banc, and after said Court had in other cases determined that said Sec. 6386, R. S. Mo. 1919, was not unconstitutional, and that deductions by life insurance companies, as claimed by the relator, were valid and proper (State ex rel. Missouri State Life Ins. Co. v. Gehner, City Assessor, et al, 8 S. W. [2d] 1068; State ex rel.

Central States Life Ins. Co. v. Gehner, City Assessor, et al, 8 S. W. [2d] 1073; State ex rel. Indemnity Co. of Missouri v. Gehner, City Assessor, et al, 8 S. W. [2d] 1067).

On consideration of said cause said Supreme Court of Missouri, at its October Term, 1928, entered its opinion sustaining the assessment by the respondents in the sum of $50,000.00, not upon the theory that said Sec. 6386 R. S. of Mo. 1919, was unconstitutional, but on the theory that since the relator owned United States Government bonds in the sum of $94,000.00, and personal assets amounting to $354,265.33, both of which were subject to liabilities (legal reserve) aggregating $333,486.69, the net taxable assets should be determined by apportioning the total liability between the two classes of property, according to their respective amounts, and then deducting from the taxable assets the liability so apportioned to that class, by which calculation said Supreme Court found that the taxable assets were approximately 79.03 per cent of the cross assets ($354,265.33), and then found that 79.03 per cent of the aggregate liability in dollars and cents was $263,554.53, which sum was deducted from said gross assets in the sum of $354,265.33, leaving net taxable assets according to said opinion in the sum of $90,710.80. Said sum being greater than the amount assessed by the Board of Equalization, said Supreme Court held that its writ of certiorari should be quashed (Rec., pp. 14-16).

Said opinion was the first pronouncement of said Supreme Court of Missouri holding that a domestic life

insurance company, under section 6386, was not entitled to deduct from its gross personal assets the full amount of its legal reserve, and also the amount of its United States Government bonds. Said opinion for the first time construed section 6386 as authorizing the apportionment of the legal reserve of domestic insurance companies between taxable and nontaxable assets, and for that purpose including in gross assets its nontaxable assets or United States Government bonds in calculating its net taxable assets under said section 6386.

In due time the appellant filed its motion for a rehearing in said cause before said Supreme Court of Missouri. Said motion is printed as Appendix B to this brief.

In said motion for rehearing the relator contended (a) that the holding of the Supreme Court of Missouri and its method of calculating the net taxable assets of the relator contravened the due-process and equal-protection-of-the-laws clauses of Sec. 1 of Art. XIV of the Amendments to the Constitution of the United States; (b) that the construction of said section 6386 contained in said opinion in effect authorized the taxation, directly or indirectly, of relator's United States Government bonds, in contravention of Section 8 of Article I of the Constitution of the United States, giving Congress the right to borrow money on the credit of the United States, as construed in McCulloch v. Maryland, 4 Wheat. 316, and numerous other cases; (c) that said construction of section 6386 and the method of calculating relator's net taxable assets resulted

in depriving the relator of at least a portion of its exemption of its Government bonds, in violation of the express provisions of United States Revised Statutes, Sec. 3701, U. S. Comp. Stat. 1918, Sec. 6816, denying states and municipalities the power to tax Government bonds, and (d) that said opinion also resulted in unlawful discrimination against the relator by taking into account its ownership of tax-exempt Government bonds in determining the net taxable value of its personal assets, and refusing to permit the deduction of both legal reserve and Government bonds.

Upon consideration of relator's motion for rehearing the Supreme Court of Missouri modified its said opinion and overruled relator's said motion (Rec., pp. 16-19), and entered judgment accordingly.

The only change appearing in the modified opinion is in the method of calculating of the net taxable assets. Said changed method of calculation is as follows: The relator's gross taxable assets, amounting to $590,265.33, are taken as the basis of the calculation instead of the sum of $354,265.33, from which the Court concludes that the taxable assets are approximately 84 per cent of the gross assets, and that 84 per cent of the aggregate liability is $280,128.81, resulting in a net taxable value of $74,136.52 instead of $90,710.80, as in the original opinion. This difference results from adding the amount of the real estate—$142,000.00—to the taxable assets of $354,265.33.

SPECIFICATIONS OF ERROR.

The errors assigned on appeal and in the petition for writ of certiorari, and now urged, are:

I.

By its opinion and judgment herein the Supreme Court of Missouri has erroneously construed Section 6386, R. S. of Mo. 1919, as authorizing the apportionment of the legal reserve between the taxable and nontaxable assets of relator, and for that purpose to include in relator's gross assets its Government bonds in the sum of $94,000.00 for the purpose of calculating the net value of its taxable personal assets, thereby resulting in the taxation of at least a portion of relator's tax-exempt Government bonds. In so far as the Supreme Court of Missouri so construed and applied section 6386, said section is made to authorize the taxation of relator's tax-exempt Government bonds, in violation of the provision of the Constitution of the United States (Section 8 of Article I), giving Congress power to borrow money on the credit of the United States, as construed by numerous decisions of the Supreme Court of the United States.

II.

The Supreme Court of Missouri, by its opinion and judgment herein, has held that Section 6386, R. S. of Mo. 1919, authorizes the apportionment of the legal reserve

authorized to be deducted by said statute between the taxable and nontaxable assets of domestic insurance companies, thereby discriminating against such insurance companies as might own Government bonds, in contravention of Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides that no state shall make or enforce any law which shall deprive any person of property without due process of law, or deny to any person the equal protection of the laws. Such construction and application of section 6386 by the Supreme Court of Missouri deprives relator of its property without due process of law, because its taxes are thereby increased beyond the plain terms of the statute by the failure to deduct the full amount of its reserve by reason of the mere circumstance that it owned Government bonds, and such action of said Court deprives the relator of the equal protection of the laws because, on account of the mere circumstance that the relator owned exempt securities, a percentage of its reserve is held to be not deductible, whereas other domestic insurance companies having no Government bonds would be permitted to deduct the full amount of such reserve.

III.

The Supreme Court of Missouri erred in including in relator's gross assets its nontaxable securities in calculating its net taxable assets because such inclusion necessarily resulted in the taxing of at least a portion of relator's Government bonds in violation of the express

provisions of U. S. Revised Statutes, Section 3701, Section 6816, U. S. Comp. Stat. 1918, denying states and municipalities the power to tax Government bonds, and contrary to numerous decisions of the Supreme Court of the United States.

IV.

For the purpose of calculating relator's net taxable assets, the opinion and judgment of the Supreme Court of Missouri erroneously includes in the relator's gross assets its tax-exempt Government bonds in the sum of $94,000.00, thereby resulting in the taxation of a portion of relator's said Government bonds, or at least resulting in an unwarranted and unlawful discrimination against domestic insurance companies owning Government bonds, by subjecting relator and other companies owning such bonds to greater burdens of taxation upon taxable property because of the ownership of some that is exempt.

V.

The Supreme Court of Missouri, by its method of calculating the net taxable assets of the relator, diminishes the amount of legal reserve deductible under Section 6386, R. S. of Missouri 1919, and thereby defeats the exemption guaranteed to owners of Government bonds contrary to U. S. Revised Statutes, Section 3701, U. S. Comp. Stat. 1918, Section 6816, and Section 8, Article I of the Constitution of the United States, and contrary to numerous decisions of the Supreme Court of the United States.

BRIEF.

I. The Government bonds owned by relator, aggregating $94,000.00, were exempt under Section 8 of Article I of the Federal Constitution, giving to Congress the power to borrow money on the credit of the United States. Said bonds were also exempt from taxation by states and municipalities under the express provisions of Section 3701, United States Revised Statutes (U. S. Comp. Stat., Sec. 6816).

McCulloch v. Maryland, 4 Wheat. 316;
Weston v. City Council of Charleston, 2 Pet. 448, 489;
Farmers Bank v. Minnesota, 232 U. S. 516;
Supervisors v. Stanley, 105 U. S. 305;
Home Ins. Co. v. New York, 134 U. S., l. c. 598;
Home Savings Bank v. Des Moines, 205 U. S., l. c. 509, 521.

II. In construing Sec. 6386 as authorizing the apportionment of the legal reserve between the relative taxable and nontaxable assets according to their respective amounts, and then deducting from the taxable assets the liabilities so apportioned to that class, the opinion of the Supreme Court of Missouri contravenes Section 8 of Article I of the Federal Constitution, giving Congress the right to borrow money on the credit of the United States, because such method of calculating relator's net assets inevitably results in denying the exemption of such bonds

from taxation under said provision of the Constitution. By taking into consideration relator's United States Government bonds in so calculating the net assets, some portion of the burden of the tax must be attributable to the ownership of such Government bonds.

Farmers Bank v. Minnesota, 232 U. S. 516;
Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136;
Miller v. Milwaukee, 272 U. S. 713;
National Life Ins. Co. v. United States, 277 U. S. 508;
City of Waco v. Amicable Life Ins. Co., 230 S. W. (Tex. App.) 698, 248 S. W. (Tex. Com. of App.) 332.

III. One of the necessary results of the method of calculating the net taxable assets of relator by the Supreme Court of Missouri is in effect to tax a portion of its deductible legal reserve. In other words, such method subjected the relator's taxable property to greater burdens because it owned some that was free from taxation. This, indirectly at least, deprived the relator of its exemption. Missouri authorities had no right to do indirectly what they could not do directly, and the inclusion of the Government bonds in the calculation resulted in a construction of Sec. 6386 repugnant to the constitutional provision aforesaid.

National Life Ins. Co. v. United States, 277 U. S. 508;

City of Waco v. Amicable Life Ins. Co., 230 S. W. (Tex. App.) 698, 248 S. W. (Tex. Com. of App.) 332;
Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136;
Miller v. Milwaukee, 272 U. S. 713;
Farmers Bank v. Minnesota, 232 U. S. 516.

IV. Under the plain terms of Sec. 6383, R. S. of Mo. 1919, and the decisions of the Supreme Court of Missouri construing said section, the reserves of domestic insurance companies are deductible from the gross taxable assets.

State ex rel. Hyde v. Buder, 315 Mo., l. c. 798, 287 S. W., l. c. 309;
State ex rel. v. Schramm, 271 Mo., l. c. 227, 198 S. W. 21.

The Supreme Court of Missouri has, therefore, repeatedly held that the entire legal reserve is deductible, and that domestic insurance companies having no tax-exempt securities may deduct their entire reserve.

State ex rel. Central States Life Ins. Co. v. Gehner, 8 S. W. (2d) 1073;
State ex rel. Central States Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068;
State ex rel. Indemnity Co. of America v. Gehner, 8 S. W. (2d) 1067.

Consequently, as construed and applied by the Missouri Supreme Court in this case, Sec. 6386 is made to contra-

vene the due process and equal protection clauses of Section 1 of Article XIV of the Amendments to the Constitution of the United States. It deprives the relator of its property without due process of law, because relator's taxes are thereby increased beyond the plain terms of the statute, Sec. 6386, by the failure to deduct the full amount of its reserve on account of the mere circumstance that it owned tax-exempt Government bonds, and it deprives the relator of the equal protection of the laws, because, on account of the mere circumstance that the relator owned exempt securities, a percentage of its reserve was held not deductible, whereas other domestic insurance companies having no Government bonds are permitted to deduct the full amount of the reserve.

Sunday Lake Iron Co. v. Wakefield, 247 U. S., l. c. 352;
Southern Ry. Co. v. Green, 216 U. S., l. c. 412;
Quaker City Cab Co. v. Pennsylvania, 277 U. S., l. c. 402;
Miller v. Milwaukee, 272 U. S., l. c. 714-715.

V. The same result is reached with reference to the violation of the due process and equal protection clauses of Section 1 of Article XIV of the Amendments to the Constitution of the United States, because of the express exemption of United States Government bonds, under the provisions of United States Revised Statutes, Sec. 3701.

VI. There is no merit in the contention of counsel for appellees, in their brief on jurisdiction, that to permit the

deduction of both the legal reserve and of the tax-exempt Government bonds would result in unequal taxation and make Sec. 6386 unconstitutional. Government bonds are exempt, not by any action of the state, but because, under the Federal Constitution and laws, the state has no power to tax them, and the legal reserve has been expressly held by the Missouri Court to be deductible, under Sec. 6386.

State ex rel. Hyde v. Buder, 315 Mo., l. c. 798, 287 S. W., l. c. 309;
State ex rel. v. Schramm, 271 Mo., l. c. 227, 196 S. W. 21;
Buist v. Charleston, 57 S. E. (S. C.), l. c. 867.

ARGUMENT.

I.

Nature of Ruling Below and Issues Involved Here.

The facts are simple and undisputed. The Missouri insurance company is a domestic insurance company, taxable under the provisions of Section 6386, Revised Statutes of Missouri 1919 (Appendix A attached hereto). The case involves an assessment for personal taxes for the year 1925. In its return filed with the Assessor showing its property as of June 1, 1925, said relator totaled assets as follows (Rec., p. 7):

Real estate	$142,000.00
Bonds, municipal	289,000.00
Bonds, Government	94,000.00
Bonds, mortgages	60,000.00
Cash	5,265.33
Total assets	$590,265.33

Its total legal reserve, including unpaid policy claims, was shown to be $333,486.69 (Rec., p. 8).

In its return, therefore, relator made the following deductions (Rec., p. 8):

Real estate (otherwise taxed)	$142,000.00
Reserve and unpaid policy claims	333,486.69
U. S. Government bonds	94,000.00
Total deductions	$569,486.69

This left net taxable assets in the sum of $20,778.64, which is conceded to be correct if relator is entitled to deduct both legal reserve and United States Government bonds.

The Board of Equalization refused to allow the deduction of $333,486.69 on the expressed ground that said section 6386 was unconstitutional, in that it violated the provisions of Section 4 of Article X of the Constitution of Missouri (Rec., p. 11). Instead, however, of assessing the total amount of property of relator as increased by the failure to allow such deduction, said board arbitrarily assessed relator in the sum of $50,000.00 (Rec., pp. 12, 16).

On certiorari, the Supreme Court of Missouri did not entertain the view of the board as to the unconstitutionality of section 6386, having affirmed the constitutionality of said section and relator's right to deduct its reserve by repeated decisions. But the Missouri court did refuse to allow the relator to deduct both its United States Government bonds and its legal reserve. After holding that the legal reserve was a liability against all of relator's property, both taxable and nontaxable, and stating that relator's gross assets were $590,265.33, which were subject to liabilities (reserve) aggregating $333,486.69, the Court propounded the query: "What is the **net** value of the taxable personal assets under section 6386?" The Court then makes its conclusion and calculation as follows (Rec., pp. 17-18):

"We know of no more equitable way to determine such value than that of apportioning the total liability between the two classes of assets (the taxable and the nontaxable) according to their respective amounts and then deducting from the taxable assets the liability so apportioned to that class. The taxable assets are approximately 84 per cent of the gross assets; 84 per cent of the aggregate liability is, in dollars and cents, $280,128.81; that sum deducted from the gross value in money of the taxable personal assets ($354,265.33) leaves $74,136.52, their net value. As this sum is greater than that at which relator's personal property was assessed by the Board of Equalization, its record should not be quashed."

It will be noted that instead of deducting in full both the reserve and the tax-exempt Government bonds, the Missouri court **takes the gross assets of $590,265.33 (which includes both Government bonds and real estate)** as a basis for calculating the net value of the taxable assets and apportions the liability between the nontaxable and taxable assets ($94,000.00 and $354,265.33). The result is that only $280,128.81 of the total legal reserve is allowed to be deducted, and $53,357.88 more property is assessed to relator, which sum, with the $20,778.64 equals $74,136.52, the amount fixed by the Court.

No matter what devious route be pursued to reach the result, or in what language the calculation be couched, it must be conceded that by cold figures **the relator's net taxable assets are increased by $53,357.88 in failing to allow the deduction of both legal reserve and Government bonds.**

The questions on this appeal relate to the validity and constitutionality of the Missouri court's construction and application of said section 6386.

II.

Illegal Taxation of, or Failure to Exempt, Government Bonds.

While there is no express provision in the Constitution of the United States exempting Government bonds from taxation, ever since the decisions in McCulloch v. Maryland, 4 Wheat. 316, and Weston v. City Council of Charleston, 2 Pet. 448, it has been held that Section 8 of Article I of the Federal Constitution giving Congress the power to borrow money on the credit of the United States, necessarily deprives the states of any power to tax federal securities, such as the bonds in question. In the Weston case, 2 Pet., l. c. 469, the Court said:

> **"The tax on Government stock is thought, by this Court, to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."**

In addition to the above-mentioned provision of the Constitution there has long been in effect Section 3701, United States Revised Statutes (U. S. Comp. Stat., Sec. 6816), expressly denying to states and municipalities power to tax Government bonds. Under these provisions of the Federal Constitution and the statutes, this Court has uni-

formly held that any method of taxation or calculation of assets which directly or indirectly results in the taxation of Government securities, in whatever form, is beyond the power of the several states and the municipalities of the several states.

In National Life Ins. Co. v. United States, 277 U. S. 508, we find an analogous situation. In that case Congress laid a tax on life insurance companies, based upon the sum of all interests and dividends and rents received, less certain deductions: (1) Interest derived from tax-exempt securities, if any; (2) a sum equal to 4 per cent of the company's legal reserve diminished by the amount of interest described in paragraph (1), and (3) seven other items not here involved. For the purpose of determining the net income of the company for the year 1921, the Collector included in the gross receipts of the company the income from tax-exempt securities, and while going through the form of deducting the amount of interest from tax-exempt securities diminished the 4 per cent deduction of reserves by the amount of interest received from tax-exempt securitis, and it was held that this defeated the exemption guaranteed to the owners of such securities. In holding the tax invalid, this Court said (277 U. S., l. c. 519):

> "The portion of petitioner's income from the three specified sources which Congress had power to tax—its taxable income—was the sum of these items less the interest derived from tax-exempt sceurities. **Because of the receipt of interest from such securities, and to**

its full extent, pursuing the plan of the statute, the Collector diminished the 4 per cent deduction allowable to those holding no such securities. Thus, he required petitioner to pay more upon its taxable income than could have been demanded had this been derived solely from taxable securities. If permitted, this would destroy the guaranteed exemption. One may not be subjected to greater burdens upon his taxable property solely because he owns some that is free. No device or form of words can deprive him of the exemption for which he has lawfully contracted."

In support of its decision in that case this Court cited the case of City of Waco v. Amicable Life Ins. Co., 230 S. W. (Tex. App.) 698, 248 S. W. (Tex. Com. of Ap.) 332. As shown by that case, the State of Texas has a statute very similar to the Missouri statute requiring insurance companies to be taxed on real and personal property, but authorizing them to deduct their reserve. The Amicable Life Ins. Co., in 1919, owned personal property aggregating $2,287,780.26, included in which were United States Government bonds aggregating $906,050.00, which were admittedly exempt from state taxation under federal laws. The legal reserve was $1,631,754.06. The trial court held that the insurance company was entitled to deduct its reserve from its taxable personal assets, or, in other words, that it was entitled also to deduct from its gross personal assets the full amount of its tax-exempt securities before deducting its reserve, which method left no taxable personal assets. The City appealed and the Texas Court of

Appeals and also the Commission of Appeals affirmed the action of the lower court. The Commission of Appeals of Texas said (248 S. W., l. c. 333):

> "We have reached the conclusion that the trial court and the Court of Civil Appeals correctly held **that tax-free Government securities cannot be taken into account in estimating the total value of the company's assets.**"

In Farmers Bank v. Minnesota, 232 U. S. 516, the question arose as to the power of the State of Minnesota to tax municipal bonds issued by a municipality of the Territory of Oklahoma, which was held to be an instrumentality and agency of the Federal Government. In that case the Court said (l. c. 526):

> "But we deem it entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the Government and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders is, in the last analysis, to impose a tax upon the right of the municipality to issue them. * * * The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

"It is on this ground that United States bonds have always been held exempt from taxation under authority of the states."

The taxing law of Minnesota under consideration provided the method of determining the **net taxable assets**, but in such calculation **the Government bonds were included in the gross assets.** With respect to the effect of this system the Supreme Court of the United States said (l. c. 528):

"It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the savings bank, computed by taking into the account all of its assets, amounting to about $12,000,000, of which the bonds were only about $700,000, and deducting therefrom its liabilities. **But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds.** In Bank of Commerce v. New York City, 2 Black. 620, it was held that the State of New York, **in taxing the capital of banks according to its valuation must leave out of the calculation that portion of the capital invested in the stocks, bonds or other securities of the United States not liable to taxation by the state.** And see Bank Tax Case, 2 Wall. 200; Home Savings Bank v. Des Moines, 205 U. S. 503, 509."

To a similar effect is Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136.

In Miller v. Milwaukee, 272 U. S. 713, the plaintiff owned

shares of stock in a corporation. A law of Wisconsin provided that corporations should be assessed on their income, after deducting interest on United States bonds. The interest on the United States bonds, of course, was credited to the surplus of the corporation. But the exemption was met by the State of Wisconsin by a provision that, while the stockholders were not taxed upon dividends received from corporations, the income of which was assessed, **yet if only part of the income of the corporation was assessed, only a corresponding part of the dividends or income received therefrom should be deducted from the income taxed to the stockholders.**

In holding an assessment under such law invalid, the Supreme Court of the United States said (l. c. 715):

> "It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of a scheme to reach a prohibited result. **If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail, even if but for its purpose of special operation it would be perfectly good.** Under the laws of Wisconsin the income from the United States bonds may not be the only item exempted from the income tax on corporations, but it certainly is the most conspicuous instance of exemption at the present time. **A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act.**

On that assumption the immunity of the national bonds is too important to allow any narrowing beyond what the acts of Congress permit. We think it would be going too far to say that they allow an intentional interference that is only prevented from being direct by the artificial distinction between a corporation and its members."

In Home Savings Bank v. Des Moines, 205 U. S., l. c. 521, where a method of taxing shares of stock failed to make allowance for the proper deduction of Government bonds in determining the taxable assets, this Court said:

"If by the simple device of adopting the value of corporation shares as the measure of the taxation of the property of the corporation that property loses the immunities which the supreme law gives to it, then national securities may easily be taxed, whenever they are owned by a corporation, and the national credit has no defense against a serious wound."

These principles have been recognized and followed by the Supreme Court of Missouri, as witness the case of State ex rel. v. Schramm, 271 Mo., l. c. 227-228, where the Supreme Court quoted with approval the decision of Farmers Bank v. Minnesota, 232 U. S., l. c. 528, and said:

"In this case, as in that, the tax is a state property tax imposed upon a 'surplus' or net assets after deducting certain liabilities. The situation is the same, and the conclusion must be the same. Since the United States bonds involved exceed the whole sur-

plus assessed and their exclusion leaves nothing assessable, it is unnecessary to consider the taxability of the railroad stock. The record of the Board of Equalization is quashed."

It follows from the foregoing authorities that the calculation by the Supreme Court of Missouri necessarily results in the taxation of a portion of relator's Government bonds. The provisions of Sec. 6386, R. S. of Mo. 1919, permit the deduction of the reserve, which in this case is admitted to be $333,486.69. Its personal assets are $354,265.33. If we do not take into consideration Government bonds in the sum of $94,000.00, this leaves the sum of $20,778.64, after deducting the reserve. The Supreme Court of Missouri, however, for the purpose of determining the net taxable assets, adds the amount of the Government bonds—$94,000.00—to the taxable assets, and prorates the reserve between the taxable and the nontaxable assets, reaching the conclusion that since the taxable assets are approximately 84 per cent of the aggregate liability, or $280,128.81, that sum deducted from the taxable assets, leaves net taxable assets in the sum of $74,136.52 instead of $20,778.64. We earnestly contend that no matter by what devious method of calculation and no matter what purpose the Court may have in view, **the ultimate result is a failure to allow the relator its full exemption on the sum of $94,000.00 represented by its Government bonds.**

It appears from the calculations by the Missouri court in its modified opinion (Rec., p. 17) that the sum of $590,265.33 (which includes both real estate and Government bonds) is taken as the basis of calculating the percentage, but in arriving at the net assets the sum of $354,265.33 is taken as the taxable personal assets. It cannot be said that the Court intended to deduct the sum of $94,000.00 also, because if that were done **no assessment would result even under the state court's theory.** The fallacies in the calculations are not explained away by the ingenious juggling of figures by counsel for appellees on pages 13 and 14 of their brief in opposition to the issuance of the writ of certiorari in this court, where they attempt to rewrite the opinion of the court below. Any theory of apportionment sought to be applied in this case will inevitably result in destroying the exemption to which the Government bonds are entitled. This is true because, by such apportionment, the Government bonds must necessarily be taken as a part of the gross assets or of the taxable assets. The inconsistency of leaving out of consideration the real estate on which taxes are otherwise paid, and at the same time including the Government bonds, evidently caused the state court to modify its opinion on motion for rehearing, **but even in the modified opinion the real estate is deducted in full.** It is evident, however, **that the federal exemption ought to be just as effective as to the Government bonds as payment of taxes on taxable property.**

In any view, therefore, as construed and applied by the Missouri court, section 6386 is made to violate Section 8 of Article I of the Federal Constitution, giving to Congress the power to borrow money on the credit of the United States, in that relator's exemption is indirectly, if not directly, defeated.

III.

Due Process of Law and Equal Protection of the Laws.

The Supreme Court of Missouri has always construed Section 6386, R. S. of Mo. 1919, as giving a deduction for the purpose of arriving at a just valuation for taxable purposes. It does not allow an exemption. So, in State ex rel. v. Schramm, 271 Mo., l. c. 227, 196 S. W. 21, referring to this statute, the Missouri Supreme Court said:

> **"Revenue laws sometimes permit taxpayers to deduct from the property to be taxed the debts owing by them. The allowance is not in any sense an exexemption, but is made by way of reaching the just amount of taxable property."**

In State ex rel. Hyde v. Buder, 315 Mo. 791, l. c. 798, 287 S. W., l. c. 309, after holding that Sec. 6386, R. S. 1919, had not been repealed by other statutes, the Supreme Court en banc said:

> **"To hold that the reserves of a domestic insurance company are proper subjects of taxation would be**

to ignore the plain terms of the statute which we have just ruled has not been repealed."

In State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068, the Supreme Court of Missouri, l. c. 1072-1073, reaffirmed the principles of the Schramm case, and expressly held that said section 6386 is constitutional. The following cases decided by the Supreme Court of Missouri en banc were in fact companion cases with the case at bar, and all were argued together:

State ex rel. American Automobile Ins. Co. v. Gehner, 8 S. W. (2d) 1057;
State ex rel. Citizens' Ins. Co. v. Gehner, 8 S. W. (2d) 1066;
State ex rel. Indemnity Co. of America v. Gehner, 8 S. W. (2d) 1067;
State ex rel. International Life Ins. Co. v. Gehner, 8 S. W. (2d) 1067;
State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068;
State ex rel. Central States Life Ins. Co. v. Gehner, 8 S. W. (2d) 1073.

A reading of all these cases will show that it is the law of the State of Missouri that a domestic insurance company, under Sec. 6386, R. S. of Mo. 1919, having no tax-exempt securities, may deduct its entire reserve. Indeed, in the following cases it was expressly held that no as-

sessment could be made where the amount of the reserve exceeded the amount of the taxable assets:

State ex rel. Central States Life Ins. Co. v. Gehner; 8 S. W. (2d) 1073;
State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068;
State ex rel. Indemnity Co. of America v. Gehner, 8 S. W. (2d) 1067.

It follows from the foregoing decisions and from the opinion in this case that the Supreme Court of Missouri construes Section 6386, R. S. of Mo. 1919, as authorizing a domestic insurance company having no Government bonds to deduct all of its reserve, but if, as in the case of the relator in this action, the company owns tax-exempt Government bonds, it may not deduct all of its reserve but must place its tax-exempt securities in its gross assets and prorate the reserve between its taxable and nontaxable assets, and thereby arrive, through the method of calculation set forth in the opinion herein, at the net taxable assets. Such method of calculation will always result in taxing, directly or indirectly, a portion of the company's tax-exempt securities, or at least in a refusal to permit the deduction of the entire amount of the reserve because of the ownership of tax-exempt securities. This means that the State of Missouri says to domestic insurance companies: **"If you invest a part of your assets in Government bonds we will refuse to grant you the right to deduct the full amount of your reserve."** This, in effect,

means: **"If you invest your assets in Government bonds we will tax them."**

In the case at bar the effect of such a method of assessment is readily seen. If we leave out of consideration, as should be done, the $94,000.00 in Government bonds, the total personal assets of the relator would be $354,265.33. The admitted amount of reserve is $333,486.69, leaving net taxable assets in the sum of $20,778.64, as returned by the relator. The Supreme Court of Missouri has said to the relator, however, "Since you own Government bonds in the sum of $94,000.00, which you have deducted, you are not entitled to both the deduction and the exemption under the federal law," and because relator owns said Government bonds the Missouri court finds that its taxable assets are $74,136.52, instead of $20,778.64. **In other words, the relator is held to have $53,357.88 more net taxable assets because it owns $94,000.00 in Government bonds.**

Under the foregoing situation, it is plain that the opinion of the Supreme Court of Missouri herein would deprive the relator of its property without due process of law, because relator's taxes are thereby increased beyond the plain terms of the statute, as construed by said Court, merely because of the circumstance that it owns tax-exempt Government bonds. Said opinion also denies to the relator the equal protection of the laws because, on account of the mere circumstance that the relator owns such exempt securities, a percentage of its reserve is held

not to be deductible, whereas other domestic insurance companies having no Government bonds would be permitted to deduct the full amount of such reserve.

The result is evident discrimination against companies owning Government bonds, and constitutes a denial of the equal protection of the laws. In Sunday Lake Iron Co. v. Wakefield, 247 U. S., l. c. 352, this Court said:

> **"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly-constituted agents."**

Again, in Southern Railway Co. v. Green, 216 U. S., l. c. 412, this Court said:

> **"The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation."**

As we have heretofore indicated, the Supreme Court of Missouri holds that a company owning no Government bonds is entitled to deduct the full amount of its reserve.

Therefore, to the extent that the relator is made to pay taxes on property in excess of $20,778.64, it has secured no benefit from the exemption allowed owners of Government bonds. The construction of Section 6386, R. S. of Mo. 1919, does not make said statute unconstitutional. It is only the construction of said statute when applied to companies owning Government bonds that renders it obnoxious to the Constitution. As said by Mr. Justice Butler in Quaker City Cab Co. v. Pennsylvania, 277 U. S., l. c. 402:

> **"As construed and applied by the state court in this case, the section violates the equal protection clause of the Fourteenth Amendment."**

On pages 7 and 8 of appellees' "Statement in Opposition to Jurisdiction on Appeal," filed in this cause, counsel for appellees are unduly concerned about the constitutionality of Section 6386, R. S. of Mo. 1919. This Court need not be concerned with what the Supreme Court of Missouri may hold on that question after the unlawful construction of said section by the Supreme Court of Missouri in this case has been condemned by this Court. There is nothing in State ex rel. American Automobile Ins. Co. v. Gehner, 8 S. W. (2d) 1057, which indicates that the giving to the relator and other companies owning Government bonds of the benefit of the federal exemption would make said section unconstitutional. As stated in the Schramm case, 271 Mo., l. c. 227, and State ex rel. v. Gehner, 8 S. W. (2d), l. c. 1072-1073, the deduction of the reserve allowed by section 6386 is not an exemption and

does not render the statute unconstitutional. The exemption from taxation of Government bonds is not a deduction granted by the Supreme Court of Missouri, but an exemption granted by the Federal Government. **Such bonds are exempt because the State of Missouri has no power to tax them.** There is no inequality in taxation because of the lack of power on the part of the State of Missouri to tax Government bonds. Every insurance company has the same right as relator to purchase Government bonds and carry them in its assets.

In Buist v. Charleston, 57 S. E. (S. C.) 862, the City of Charleston, under authority of an act of the Legislature, issued refunding bonds which were, by the provisions of said act, made exempt from taxation. It was sought to enjoin the issuance of the bonds on the ground that the exemption of the bonds resulted in unequal taxation, because those holding no bonds were required to pay higher taxes than those who owned bonds. The Court disposed of this objection by saying (l. c. 867):

> **"The objection stated in the eighth paragraph of the petition must be overruled, as such result is incidental to all exemptions of property from taxation. No case has been cited to show that such objection has ever rendered a statute unconstitutional."**

What we have said with reference to discrimination as to the exemption under the Federal Constitution applies also in connection with the exemption allowed under the express provisions of U. S. Revised Statutes, Sec. 3701.

IV.

Conclusion.

It follows from the foregoing discussion and the authorities cited in our brief that the construction and application of said section 6386 by the Supreme Court of Missouri in effect destroys the exemption from taxation granted by the Constitution and statutes of the United States, deprives relator of its property without due process of law, denies to it the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Federal Constitution and constitutes an unlawful discrimination against the relator by the refusal to permit it to deduct the full amount of its legal reserve, because of the mere circumstance that it owned as a part of its assets tax-exempt Government bonds. We believe this Court has jurisdiction of these questions on appeal and that the judgment of the state court should be reversed. If our view as to jurisdiction on appeal is incorrect, certainly jurisdiction should then be taken on certiorari.

Respectfully submitted,

JAMES C. JONES,
LON O. HOCKER,
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Counsel for Appellant (Petitioner).

APPENDIX A.

The provisions of Section 6386, Revised Statutes of Missouri, 1919, as construed and applied by the original opinion of the Supreme Court of Missouri, as well as by its modified opinion in this case, are as follows:

> "Sec. 6386. **Home Companies Subject to What Tax.** —The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and school purposes, as provided in the general revenue laws of this state in regard to taxation and assessment of insurance companies. Every such company or association shall make returns, subject to the provisions of said laws: First, of all the real estate held or controlled by it; second, of the net value of all its other assets or values in excess of the legally required reserve necessary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals."

APPENDIX B.

In the

Supreme Court of Missouri,
En Banc.

October Term, 1928.

State of Missouri at the Relation of Missouri Insurance Company, a Corporation,
Relator,
vs.
Frederick Gehner, as Assessor of the City of St. Louis, et al.,
Respondents.
No. 27,549.

RELATOR'S MOTION FOR REHEARING.

Now comes the relator and moves the Court to grant it a rehearing in this cause for the reason that the Court has based its opinion upon a misapprehension of the facts, and has inadvertently overlooked the following decisive and material matters:

1. The opinion in this case is based upon the assumption that Section 6386, Revised Statutes of Missouri, 1919, is constitutional, and cites the case of State ex rel. Missouri State Life Insurance Co. v. Gehner, 8 S. W. (2d) 1068, 1072, where the same learned writer who wrote the opinion in this case so held. The opinion also expressly applies said section 6386 to this case.

With reference to the provisions of said section 6386 the Court states that it provides that the **net value** of all personal assets **in excess of the legally required reserve** shall be assessed and taxed as the property of individuals. The Court then states:

> "**The section, of course, deals only with property which is subject to taxation.** The question in this case is: how shall the net value of the **taxable assets** be determined?"

The Court then concludes:

> "To put the question concretely: relator's nontaxable assets amount to $94,000.00, its taxable assets to $354,265.33, both are subject to liabilities aggregating $333,486.69—what is the net value of the taxable assets under section 6386? We know of no more equitable way to determine such value than that of apportioning the total liability between the two classes of assets according to their respective amounts and then deducting from the taxable assets the liability so apportioned to that class. Taxable assets are approximately 79.03 per cent of the gross assets; 79.03 per cent of the aggregate liability is in dollars and cents $263,554.53; that sum deducted from the gross value in money of the taxable assets leaves $90,-710.80, their net value. As this sum is greater than that at which relator's personal property was assessed by the Board of Equalization its record should not be quashed."

From the foregoing manner of calculating relator's net assets, the Court's reasoning and conclusions are made up of three propositions: (1) The relator is possessed of nontaxable Government bonds and also taxable assets,

the taxable assets being 79.03 per cent of the gross assets. (2) The relator's legal reserve, as fixed by law, is admittedly $333,486.69, which, the Co t holds, is a liability due the policyholders and charged against all of the relator's assets. 79.03 per cent of such reserve is $263,554.53. (3) Deducting this 79.03 per cent of the reserve, or $263,554.53, from the gross taxable assets, amounting to $354,265.33, leaves $90,710.80, which the Court concludes represents the net taxable assets of the relator.

If we take the method of deducting both the nontaxable assets and the legal reserve from the gross assets, which are $448,265.33, the net assets are $20,778.64. The figure arrived at by the Court in its opinion, $90,710.80, is reached by calculating that the taxable assets represent 79.03 per cent of the legal reserve. In other words, the Court permits the relator to deduct only 79.03 per cent of its reserve, because it owns nontaxable assets aggregating $94,000.00. The sum of $90,710.80 is exactly $69,932.16 more than $20,778.64. The Court could have reached the same result by saying that the relator, having 20.07 per cent of nontaxable assets, must therefore deduct a sum equal to 20.07 per cent from its legal reserve, or the sum of $69,932.16. The Court, in answer to the question, "What is the net value of taxable assets under section 6386?" states:

> "We know of no more equitable way to determine such value than that of apportioning the total liability between the two classes of assets according to their respective amounts and then deducting from the taxable assets the liability so apportioned to that class."

The opinion had just stated, however, that section 6386 **"of course deals only with property which is subject to taxation."** How, then, can the Court read into section 6386 a provision that the legal reserve deductible thereunder does not apply while the Company owns Government bonds or other exempt securities?

Through an unbroken line of decisions in this state taxing statutes are construed strictly in favor of the taxpayer.

State ex rel. v. Hyde, 292 Mo., l. c. 352, 241 S. W. 396;
In re Estate of Clark, 270 Mo. 351, 194 S. W. 54;
State ex rel. v. Lesser, 237 Mo., l. c. 318, 141 S. W. 888.

In State ex rel. Hyde v. Buder, 315 Mo. 791, l. c. 798, 287 S. W., l. c. 309, after holding that Section 6386, R. S. 1919, had not been repealed by other statutes, the Supreme Court en banc said:

> **"To hold that the reserves of a domestic insurance company are proper subjects of taxation would be to ignore the plain terms of the statute which we have just ruled has not been repealed."**

In the following more recent cases the Court en banc held that section 6386 authorized the deduction of the legal reserve of a domestic life insurance company although no nontaxable or exempt assets were involved.

State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068;
State ex rel. Central States Life Ins. Co. v. Gehner, 8 S. W. (2d) 1073.

Webster's New International Dictionary defines the word "net" to mean "clear of, or free from, all charges, deductions," etc. The author also states:

> "The lexical definition of 'net' is 'clear of all deductions,' "

and then quotes the Supreme Court of the United States in St. John v. Erie Ry. Co., 22 Wall., l. c. 148, where, after quoting such definition, it is said:

> "The popular acceptance of the term is the same."

We respectfully submit that the opinion constitutes a plain denial of the right given relator by Section 6386, R. S. 1919, to deduct its legal reserve. The statute is plain. The calculation of relator's taxable assets under its return and the statute is a mere problem of subtraction in arithmetic.

We further submit, therefore, that the opinion violates the plain terms of the statute in refusing to permit the relator to deduct the full amount of its reserve, and that in so holding the opinion contravenes Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides that no state shall make or enforce any law which shall deprive any person of property with-

out due process of law or deny to any person the equal protection of the laws. The opinion would deprive the relator of its property without due process of law because its taxes are increased beyond the plain terms of the statute by a failure to deduct the full amount of its reserve. It also denies to relator the equal protection of the laws because of the mere circumstance that the relator owns exempt securities, a percentage of its reserve is held to be not deductible, whereas other domestic companies having no Government bonds are permitted to deduct the full amount of such reserve.

II. If Section 6386, R. S. of Mo. 1919, be construed to authorize a full deduction of the reserve in case of domestic life insurance companies having no nontaxable assets, but requires that in case of relator and other companies owning nontaxable securities only a proportionate part of the reserve may be deducted, then such statute is unconstitutional in that it deprives the relator of its property without due process of law and denies to relator the equal protection of the laws, in the manner above stated under point I of this motion. The effect of the opinion is to so hold, and we therefore earnestly contend that in so construing section 6386 the Court would render said section unconstitutional, as aforesaid.

III. On the first page of its opinion herein the Court states that relator's method of determining the net value of its assets "was to deduct from the gross personal assets the aggregate of all liabilities and from **that net value**

to deduct the value of its nontaxable assets; in other words, it first took out of its gross assets all nontaxable assets and then from the remaining taxable assets it deducted the whole of its liabilities."

We do not know that the opinion means to imply that it makes any difference whether relator deducted its legal reserve first or its Government bonds first. We do not see that it would make any difference. As stated on page 5 of our reply brief in this case, there is nothing in this record to show that the Government bonds were invested in the reserve, and that it is immaterial whether they were or not. **The fact remains that there is no uncertainty about the amount of the reserve.** It is fixed by statute (Section 6131, R. S. of Mo. 1919) and by the stipulation of the parties in this case with just as much certainty as the amount of the Government bonds is fixed. The language of section 6386, with reference to the matter under discussion, is that domestic life insurance companies, such as relator, shall make return for taxation: "First, of all the real estate held or controlled by it; second, of the net value of all the other assets or values **in excess of the legally required reserve,** * * * which net values shall be assessed and taxed as the property of individuals."

As heretofore indicated, the Court has held that section 6386 deals only "with property subject to taxation." Instead of adopting the relator's method of deduction of the reserve and exempt securities, by its opinion the Court has held that relator is not entitled to deduct the full

amount of its legal reserve, but that since it owns both nontaxable and taxable assets, and the taxable assets amount to 79.03 per cent of the gross assets, then the relator is entitled to deduct only 79.03 per cent of its reserve, or $263,554.53, whereas, if it had owned no Government bonds, it would have been entitled to deduct the full amount of its reserve, or $333,486.69. The Court has cited no authority to support its conclusion in this matter, and has pointed out no language in section 6386 which authorizes any different method of deduction where the company owns nontaxable assets.

Sections 6115, 6116, 6117, 6126 and 6128, R. S. of Mo. 1919, specifically authorize and contemplate that life insurance companies might invest their assets in United States Government bonds. While the opinion does not give any reason or cite any authority in support of the proposition that relator is not entitled to deduct in full both its Government bonds and its legal reserve, counsel for respondents, in their brief, cite the case of State ex rel. American Automobile Ins. Co. v. Gehner, 8 S. W. (2nd) 1057, in support of the proposition that to permit the deduction of both the nontaxable securities and the reserve would amount to a double deduction. The case cited does not so hold, and if it did, for the reasons hereinafter stated it would violate the Federal Constitution, as hereinafter indicated.

But there is not a double deduction. The State of Mis-

souri, neither by section 6386 nor by any other section, authorizes the deduction of Government bonds.

They are **exempt** from taxation because the State of Missouri has no power to tax them. Therefore, when section 6386 authorizes the deduction of the reserve, that is the first and only deduction authorized by the State of Missouri. The fact that the relator in this case is entitled to deduct its Government bonds and also entitled under section 6386 to deduct its reserve does not amount to discrimination or unequal taxation. If there is any inequality in the taxation **it results from the lack of power to tax Government bonds.** Every insurance company has the same right as the relator to purchase Government bonds. As pointed out in State ex rel. Schramm, 271 Mo., l. c. 226-227, the deduction of reserve authorized by section 6386 is not, in fact, an exemption. The Court there said:

> **"Revenue laws sometimes permit taxpayers to deduct from the property to be taxed the debts owing by them. The allowance is not in any sense an exemption, but is made by way of reaching the just amount of taxable property."**

To the same effect is State ex rel. v. Gehner, 8 S. W. (2nd), l. c. 1072.

There is no express provision of the Federal Constitution prohibiting a state from taxing United States bonds. The Constitution does, however, authorize and empower the Government to borrow money and issue bonds. Ever

since the cases of McCulloch v. Maryland, 4 Wheat. 316, and Weston v. City Council of Charleston, 2 Pet. 448, it is the settled law that a state has no power, directly or indirectly, to tax Government securities. In the Weston case (l. c. 469) the Court said:

> **"The tax on Government stock is thought, by this Court, to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."**

In Farmers Bank v. Minnesota, 232 U. S. 516, the question arose as to the power of the State of Minnesota to tax municipal bonds issued by a municipality of the Territory of Oklahoma, which was held to be an instrumentality and agency of the Federal Government. In that case the Court said (l. c. 526):

> "But we deem is entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the Government, and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders is, in the last analysis, to impose a tax upon the right of the municipality to issue them. * * * The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

"It is on this ground that United States bonds have always been held exempt from taxation under authority of the states."

The taxing law of Minnesota under consideration provided the method of determining the **net taxable assets**, but in such calculation the Government bonds were included in the gross assets. With respect to the effect of this system the Supreme Court of the United States said (l. c. 528):

> "It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the savings bank, computed by taking into the account all of its assets, amounting to about $12,000,000.00, of which the bonds were only about $700,000.00, and deducting therefrom its liabilities. **But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds.** In Bank of Commerce v. New York City, 2 Black 620, it was held that the State of New York, **in taxing the capital of banks according to its valuation must leave out of the calculation that portion of the capital invested in the stocks, bonds or other securities of the United States not liable to taxation by the state.** And see Bank Tax Case, 2 Wall. 200; Home Savings Bank v. Des Moines, 205 U. S. 503, 509."

To a similar effect is Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136.

The Farmers Bank Case, 232 U. S. 516, was followed by this Court in State ex rel. American Automobile Co. v.

Schramm, 271 Mo. 223, **where it is expressly held that a system arriving at the value of net assets by including tax-exempt Government securities in the gross assets** would result in taxing the Government securities. The Court, quoting from the Farmers Bank Case, 232 U. S., l. c. 528, said that under such a system of taxation **"it is obvious that some portion of the burden is attributable to the ownership of the municipal bonds,"** and the Court concluded:

> "In this case, as in that, the tax is **a state property tax imposed upon a 'surplus' or net assets after deducting certain liabilities. The situation is the same.**"

In the very recent case, National Life Ins. Co. v. United States, 277 U. S. 508, the Supreme Court had before it the act of Congress taxing life insurance companies based upon the sum of all interest, dividends and rents received, less (1) interest derived from exempt securities, (2) a sum equal to 4 per cent of the company's legal reserve, diminished by the amount of interest on exempt securities, and (3) seven other miscellaneous items not pertinent to the issues before the Court. The plaintiff was compelled to pay taxes on its income after deducting the interest received from tax-exempt securities from the 4 per cent deduction guaranteed by section (2). It was contended that the tax was discriminatory and unconstitutional because of requiring the deduction of the amount of interest on tax-exempt securities from the 4 per cent deduction. The Court so held (l. c., pp. 519, 522):

"Petitioner maintains that the result of the Collector's action was unlawfully to discriminate against it and really to exact payment on account of its exempt securities, contrary to the Constitution and laws of the United States. Also that diminution of the ordinary deduction of 4 per cent of the reserve because of interest received from tax-exempt securities, in effect, defeated the exemption guaranteed to their owners.

"The portion of petitioner's income from the three specified sources which Congress had power to tax—its taxable income—was the sum of these items less the interest derived from tax-exempt securities. Because of the receipt of interest from such securities, and to its full extent, pursuing the plan of the statute, the Collector diminished the 4 per cent deduction allowable to those holding no such securities. Thus, he required petitioner to pay more upon its taxable income than could have been demanded had this been derived solely from taxable securities. **If permitted, this would destroy the guaranteed exemption. One may not be subjected to greater burdens upon his taxable property solely because he owns some that is free. No device or form of words can deprive him of the exemption for which he has lawfully contracted.**

* * * * * * *

"**Congress had no power purposely and directly to tax state obligations by refusing to their owners deductions allowed to others.** It had no purpose to subject obligations of the United States to burdens which could not be imposed upon those of a state.

"Considering what has been said, together with the saving clause just quoted, and the manifest general purpose of the statute, **we think that provision of the act which undertook to abate the 4 per cent deduction by the amount of interest received from tax-exempt securities cannot be given effect as against peti-**

tioner under the circumstances here disclosed. It was unlawfully required to pay $92,490.20 and is entitled to recover."

The case of City of Waco v. Amicable Life Ins. Co., 248 S. W. (Tex. Ap.) 332, is cited in support of the opinion of the Supreme Court in National Life Ins. Co. v. U. S., 277 U. S., l. c. 521. That case cannot be distinguished from the case at bar. Texas has a statute authorizing domestic life insurance companies to deduct their reserve from their total assets. The city claimed that the company could not deduct directly its reserve and also tax-exempt Government securities, but the trial court and Court of Civil Appeals held both were deductible. The Commission of Appeals, in affirming the action of the lower court, said (l. c. 333-335):

"We have reached the conclusion that the trial court and the Court of Civil Appeals correctly held that tax-free Government securities cannot be taken into account in estimating the total value of the company's assets. The fallacy in the contentions of the city arises out of treating the reserve as an asset instead of a liability or debt of the company. It may be conceded that if our statutes required the investment of the reserve in a trust fund and exempted that fund from taxation, the securities of the company not so invested would be subject to taxation, and if the company should fail to provide such trust fund and all its assets were mingled, it would not be entitled to a deduction for its tax-free securities except to the extent that they might exceed the total amount required to be invested in its reserve fund. But we have no such question presented here. The reserve of a life

insurance company is not an asset, but a liability. If the amount of that reserve is invested in a trust fund, the fund is, of course, an asset. But even in such case the fund is not exempt from taxation unless expressly so made by statute. * * *

"Nothing, to our mind, could be plainer than that for the purposes of taxation the reserve is treated as a debt or liability, and the deduction allowed is not in any sense the removal of any specific part of the assets of the company from taxation. As stated above, the statute does not require the investment of the amount of the reserve or the setting apart of any of the assets of the company as a trust fund to cover or secure the liability to policyholders represented by the reserve; nor was that procedure actually followed by the complaining company in the present case. Article 4764 does not exempt any fund or assets of the company from taxation as constituting a reserve fund, but, on the contrary, specifically denominates the reserve a debt and authorizes a deduction of that debt from the gross value of the company's property.

"We also think the statute itself eliminated from the gross assets of the company its tax-free Government securities. The statute provides that:

" 'All of the personal property of such insurance companies shall be valued as other property is valued for assessment in this state.'

"When we turn to our statutes governing the assessment of personal property we find that owners are required to list their property with the Assessor under various hearings or items (R. S., Art. 7518). Under subdivision 37 of this article it is provided that this list shall contain 'amount and value of bonds and stocks other than United States bonds.' Thus it will be seen that in the assessment of personal property United States bonds are expressly omitted. * * *

"We have serious doubt whether the Legislature had the power under the method it adopted for as-

sessing the personal property of the company to take into consideration for any purpose the tax-free Government securities. The deduction allowed for the reserve, it is true, was a deduction which the Legislature was not required to make, and in making it the Legislature had, no doubt, the power to reduce the amount of this deduction by offsetting against it the value of any specific property of the company. In other words, the Legislature had the power to limit the deduction to a particular character of the company's assets. For example, we see no reason why the Legislature could not limit the deduction from the total personal assets of the company to the amount by which the reserve might exceed the real estate of the company. But the statute does not provide for the deduction to be made from any particular character of assets. It is general, and taken from the gross. **Under this method the effect of including the tax-free securities in the gross assets necessarily requires the offsetting of those assets against the reserve up to its full amount. It would be impossible, therefore, for the company to obtain the benefit of investing its funds in tax-free securities unless it invested an amount sufficient to cover the reserve and leave a surplus; and in that event it would be benefited by the tax-free character of its securities only to the extent of this surplus. We are strongly inclined to the view that, if the statute be interpreted to require an inclusion of tax-free securities in the gross assets of the company, it would be violative of the United States statutes exempting these securities from taxation.''**

The conclusion seems to us irresistible that since it is unlawful to tax United States bonds, either directly or indirectly, the proposed method of taxation adopted by the Court in its opinion is manifestly contrary to the provi-

sions of the statute, Sections 6481, 6816 and 6825, U. S. Comp. Stat. 1918, denying states and municipalities power to tax Government bonds. The proposed method also violates the due process of law and equal protection of the law clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States. It deprives the relator of its property without due process of law because authorizing a tax on at least some portion of exempt securities in the absence of any valid law authorizing such taxation. It denies to the relator the equal protection of the laws because under the proposed method the relator is denied the right to deduct a portion of its reserve while other companies which do not own Government bonds are allowed the full deduction.

IV. But the proposed method of taxing the relator is not only beyond the power of the state, but amounts to an unlawful discrimination against the relator and other insurance companies who invest their reserve or other assets in Government bonds. As heretofore pointed out, it means that the state says to the relator and other insurance companies: **"If you invest your reserve in Government bonds, we will refuse to grant you the right to deduct your reserve."** This indirectly means: **"If you invest your assets in Government bonds we will tax them."**

In Miller v. Milwaukee, 272 U. S. 713, the plaintiff owned shares of stock in a corporation. A law of Wisconsin provided that corporations should be assessed on their income, after deducting interest on United States bonds. The interest on the United States bonds, of course, was

credited to the surplus of the corporation. But the exemption was met by the State of Wisconsin by a provision that while the stockholders were not taxed upon dividends received from corporations, the income of which was assessed, **yet if only part of the income of the corporation was assessed, only a corresponding part of the dividends or income received therefrom should be deducted from the income taxed to the stockholders.**

In holding an assessment under such law invalid, the Supreme Court of the United States said (l. c. 715):

> "It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of a scheme to reach a prohibited result. **If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good.** Under the laws of Wisconsin the income from the United States bonds may not be the only item exempted from the income tax on corporations, but it certainly is the most conspicuous instance of exemption at the present time. **A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act. On that assumption the immunity of the national bonds is too important to allow any narrowing beyond what the acts of Congress permits. We think it would be going too far to say that they allow an intentional interference that is only prevented from being direct by the artificial distinction between a corporation and its members.**"

In Supervisors v. Stanley, 105 U. S. 305, the Supreme Court had before it a statute of New York which authorized assessments against shareholders in national banks without permitting the owners to deduct their just debts from the value thereof. The federal statute then provided that persons having money invested in stocks in national banks would be assessed at no higher rate than persons whose property was invested in other monied capital in the state. Another statute of New York permitted owners of personal property, other than shares in national banks, to deduct their just debts from the value thereof. The plaintiff owned shares of stock in a national bank and was compelled to pay taxes thereon without being allowed to deduct his just debts. He sued to recover the tax, and the Supreme Court held that the tax was void and that plaintiff was entitled to recover because of unlawful discrimination against owners of stock in national banks.

So, in this case, it is sought to tax the relator on its personal property without deducting its reserve, merely because it owns Government bonds, whereas other insurance companies who may not own Government bonds are given the right under Section 6386, Revised Statutes 1919, to deduct the full amount of their reserve.

In Knox, Attorney-General, v. Southern Paper Co., 108 So. (Miss.) 288, the Court had before it an assessment of personal property against the defendant, which was claimed to be a violation of Section 112 of the Constitution of the State of Missouri requiring that taxation "must be uni-

form and equal throughout the state and property taxed in proportion to its value." The Court said (l. c. 290):

> **"But under the equality clause of the Fourteenth Amendment of the Federal Constitution as construed by the Supreme Court of the United States, if in assessing property for taxes either the requirement that it be assessed at its true value, or the requirement that its assessment shall be uniform and equal, is sacrificed, it must be the former and not the latter."**

In Buist v. Charleston, 57 S. E. (S. C.) 862, the City of Charleston, under authority of an act of the Legislature, issued refunding bonds which were by the provisions of said act made exempt from taxation. It was sought to enjoin the issuance of the bonds on the ground that the exemption of the bonds resulted in unequal taxation, because those holding no bonds were required to pay higher taxes than those who owned bonds. The Court disposed of this objection by saying (l. c. 867):

> **"The objection stated in the eighth paragraph of the petition must be overruled, as such result is incidental to all exemptions of property from taxation. No case has been cited to show that such objection has ever rendered a statute unconstitutional."**

It follows, therefore, that when the Court, by its opinion, deducts a part of the reserve because the relator owns Government bonds, it unlawfully discriminates against companies investing their assets in Government bonds. This is true, whether we regard the opinion as refusing to

allow the deduction authorized by the plain terms of section 6386, or whether we consider the opinion as construing section 6386 as authorizing the method of calculation adopted by the Court. Such discrimination is unlawful, and in violation of the equal protection of the laws clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

For all of the foregoing reasons we earnestly contend that the proposed method of taxation is illegal and that a rehearing should be granted herein.

Respectfully submitted,

Jones, Hocker, Sullivan & Angert,
Attorneys for Relator.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

STATE OF MISSOURI, at the Relation of MISSOURI INSURANCE COMPANY, a Corporation, Relator,

Appellant,

vs.

FREDERICK GEHNER, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis, A. R. SCHOLLMEYER, CLYDE CARSON, WILLIAM L. HECKMANN and JOSEPH J. LICHTENFELD, as Members of the Board of Equalization of the City of St. Louis,

Appellees.

No. 222.

STATEMENT IN OPPOSITION TO JURISDICTION ON APPEAL.

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May It Please the Court:

The appellee, in opposition to the jurisdiction of this Court to review the above-entitled cause on appeal, respectfully submits:

A.

NATURE OF CASE AND RULING BELOW.

The appellant is an insurance company organized under the laws of Missouri. Under the general laws of the state, Section 12766, R. S. Mo. 1919, as amended, Laws of 1923, page 275, all taxable property which a person owns, possesses, manages or controls must be returned for taxation. Section 6386, Revised Statutes of Missouri 1919, however, permits domestic insurance companies to make a return different from that required of individuals and other corporations. It provides:

> "Sec. 6386. **Home Companies Subject to What Tax.** —The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and school purposes, as provided in the general revenue laws of this state in regard to taxation and assessment of insurance companies. Every such company or association shall make returns, subject to the provisions of said laws: First, of all the real estate held or controlled by it; second, of the net value of all its other assets or values in excess of the legally required reserve necessary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals."

The company made its return, which showed its assets and the deductions it claimed under section 6386, as follows.

Total Assets		$590,265.33
Government Bonds (exempt).....		94,000.00
		$496,265.33
Statutory deductions:		
Real estate	$142,000.00	
Legal reserve	326,522.69	
Unpaid policy claims....	6,964.00	$475,486.69
		$ 20,778.64

The Assessor and the Board of Equalization, to whom the company appealed, assuming that section 6386 was invalid, disallowed the deductions the company claimed under it and assessed its personal property at $50,000.

The Court upheld appellant's contention that the statute is valid, construing it as applying only to **taxable** property and as permitting domestic insurance companies to deduct from their **taxable** property returned their real estate (taxed as other property) and that portion of their legal reserve and unpaid policy claims which consists of **taxable** property . It also held that the company's legal reserve and unpaid policy claims ($333,486) was a charge upon the whole of its assets, 84 per cent of which assets consisted of **taxable** property; that, therefore, 84 per cent of its legal reserve and unpaid policy claims ($280,122.81) likewise consisted of **taxable** property, and, under the statute, was deductible from its **taxable** personal property—

that is, from its **taxable** assets after deducting its real estate, which is taxed as other property (Opinion below).*

The company below was not in a position to complain of the action of the Court in sustaining the validity of the statute, because, if invalid, it could have been taxed on the whole of its assets, excepting its Government bonds. In its motion for a rehearing it asserted that, in construing the statute so that it could not also deduct from its **taxable** property that part of its reserve and unpaid policy claims which consist of nontaxable property, its rights under the Federal Constitution and laws were violated.

B.

STATUTORY PROVISIONS RELATING TO JURISDICTION.

An appeal in this case is sought from the Supreme Court of Missouri, on the theory that, prior to the enactment of the Act of January 31, 1928, as amended by Act of April 26, 1928, appellant would have been entitled to a writ of error to the Supreme Court of Missouri. In support of this Court's jurisdiction appellant cites that part of Section 237 of the Judicial Code, as amended, being Section 344, Title 28, U. S. Code, Ann., which provides:

> "(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the

*The uncertified transcript has already been filed and the record has not yet been printed. All references are made to the opinion below, as we have no means of obtaining the pages of the transcript.

> suit could be had * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *"

On page 5 of its statement as to jurisdiction on appeal, appellant enumerates the grounds on which, in its motion for a rehearing, it was claimed that the construction placed upon the statute by the Supreme Court of Missouri violates the Constitution and statutes of the United States, and, on the following page, says:

> "In other words, it was contended by relator that the construction and application of section 6386 by the Supreme Court of Missouri, as applied to domestic insurance companies owning Government bonds, made such section repugnant to the constitutional provisions aforesaid and to the statute of the United States exempting Government bonds from taxation."

The Supreme Court of Missouri was cited to the principles set forth in the following decisions on what appellant asserts are similar questions:

> Farmers Bank v. Minnesota, 232 U. S. 516;
> Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U. S. 136;
> National Life Ins. Co. v. United States, 277 U. S. 508;
> Miller v. Milwaukee, 272 U. S. 713;

Supervisors v. Stanley, 105 U. S. 305;
McCulloch v. Maryland, 4 Wheat. 316;
Weston v. Charleston, 2 Pet. 448.

These cases may be distinguished in that the statute involved in each of them contemplates the imposition of a tax, either directly or indirectly, on the taxpayer's property, even if the whole of such property is in obligations of the United States, while in the case made by the record here the operation of the statute cannot have that effect.

C.

CASES RELIED ON BY APPELLANT FOR JURISDICTION.

Under subdivision D the appellant cites the following decisions in support of jurisdiction on appeal:

Great Northern Ry. Co. v. Minnesota, 278 U. S. 503, 49 S. Ct. R. 191;
Nashville, C. & St. L. Ry. v. White, 278 U. S. 456, 49 S. Ct. R. 189;
New York v. Zimmerman, 278 U. S. 63, 49 S. Ct. R. 61;
Fox River Paper Co. v. R. R. Com. of Wisconsin, 274 U. S. 651, 47 S. Ct. R. 669;
Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 47 S. Ct. R. 179.

In all of these cases the validity of a statute was drawn into question, on the ground that it was repugnant to the Constitution or laws of the United States. They are distinguished from the present case in that here the taxing officials claimed the statute was void and undertook to assess the company's property under the general law for a higher amount (Opinion below), while the company based its right to certain deductions on the statute.

The state court held the statute valid and construed it as applying only to **taxable** property. On the basis of this construction the Court upheld the action of the Board of Equalization, which, for the purpose of taxation, placed a valuation of $50,000 on the company's personal property, which personal property it was within the power of the State to tax on a value in excess of $354,000—the total assets, less real estate and tax-exempt bonds. Appellant's right to deduct from its **taxable** property returned **any** part of its legal reserve and unpaid policy claims is not a privilege or immunity conferred upon it by the Constitution or laws of the United States, but rests upon Section 6386, R. S. Mo. 1919, or does not exist. Under its previous decision (State ex rel. American Automobile Ins. Co. v. Gehner, 8 [2nd] S. W. 1057, l. c. 1059) the state court could only construe section 6386 as it did, or hold it to be violative of the State Constitution. To have so construed the statute as to render it unconstitutional would have deprived the company of all of its tax-

able assets, leaving all of its property, except its tax-exempt Government bonds, subject to taxation.

On the facts disclosed by the record we contend that the appellant is not only not entitled to an appeal, but that it is not even entitled to this Court's discretionary writ of certiorari.

Respectfully submitted,

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OLIVER SENTI,
First Associate City Counselor,
Attorneys for Appellees.